Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Petitioner,

v.

VICTOR CARPENTER, ALLEN BENNETT, JAMES LOWDER, RICHARD SPEAR, ALBERT C. WALKER, RONALD Y. NAKASONE, MOLLEEN MATSUMURA, AND MICHAEL BAUMAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Certiorari should be granted to determine whether the Ninth Circuit disregarded a core precept of federalism when it failed to follow California precedents, and instead relied on its own jurisprudence to hold that San Francisco's 60-year ownership of a historically significant Latin Cross, shrouded in a public park far removed from the seat of City government, violated the California Constitution's No Preference to religion clause.

PARTIES TO THE PROCEEDING

Petitioners, the City and County of San Francisco, the San Francisco County Recreation and Park Commission, and Joel Robinson,[1] in his official capacity as Acting General Manager of the San Francisco County Recreation and Park Department, were defendants in the lower court proceeding before the United States District Court for the Northern District of California, and were Appellees before the United States Court of Appeals for the Ninth Circuit.

Respondents, Victor Carpenter, Allen Bennett, James Lowder, Richard Spear, Albert C. Walker, Ronald Y. Nakasone, Molleen Matsumura, and Michael Bauman, are local religious leaders and citizens. They were the Plaintiffs in the lower court proceedings and Appellants before the United States Court of Appeals for the Ninth Circuit.

There are no other parties to this action.

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[1] Substituted for Mary Burns, General Manager of the San Francisco County Recreation and Park Department

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the August 20, 1996 opinion and judgment of the Court.

OPINIONS BELOW

On August 20, 1996, the United States Court of Appeals for the Ninth Circuit issued its opinion reversing the decision of the United States District Court for the Northern District of California. The opinion of the Ninth Circuit is reproduced at pages App. 1 through App. 14 of the Appendix to this Petition. The Ninth Circuit's opinion has been published at 93 F.3d 627 (9th Cir. 1996). The opinion of the District Court is reproduced at pages App. 15 through App. 49 of this Appendix. The District Court's opinion has been published at 803 F.Supp 337 (1992).

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the United States Court of Appeals for the Ninth Circuit and its judgment of August 20, 1996. That judgment reversed and remanded the District Court's determination with respect to the constitutionality of the San Francisco's ownership of the Mount Davidson Cross; a large Latin cross that has stood in parkland far removed from any government building, but owned by San Francisco for

more than 60 years. The Appellees' Petition for Rehearing with Suggestion For Rehearing *En Banc* was denied on October 16, 1996. *See* Order denying Petition at pages App. 61-62 of the Appendix to this Petition. Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 4 of the California Constitution states, in relevant part:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed.

STATEMENT OF THE CASE

The Mount Davidson Cross is a 103-foot tall unadorned concrete and steel cross shrouded in tall trees atop Mount Davidson, a 40-acre public urban eucalyptus park far removed from City Hall. San Francisco has owned the Mount Davidson Cross since it was erected in 1934. At issue in this case is a core principle of federalism: Did the Ninth Circuit disregard California law and erroneously apply its own "per se" rule to hold that San Francisco's 60-year ownership of the Mount Davidson Cross violated the California Constitution's No Preference religion clause?

This litigation began when various local religious leaders and residents brought suit in the Northern District of California. The plaintiffs challenged the City's

ownership of the Mount Davidson Cross as violating the Establishment Clause of the United States Constitution, and the No Preference Clause, the Ban on Aid to Religion Clause, and the Establishment Clause of the California Constitution. On cross motions for summary judgment, the District Court held that the City's ownership of the Mount Davidson Cross did not violate the California Constitution or the United States Constitution. *Carpenter v. City and County of San Francisco*, 803 F.Supp. 337 (1992).

In analyzing the No Preference Clause, the District Court relied on two relevant California cases, *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) and *Okrand v. City of Los Angeles*, 207 Cal. App.3d 566 (1989). The District Court made several significant factual findings: (1) The historical records reflect that San Francisco built the Mount Davidson Cross as an unadorned public monument and a work of art in 1934, 803 F.Supp. at 340; (2) Even on a clear day, the Mount Davidson Cross is not visible or partially visible to the naked eye, or identifiable as a cross from most San Francisco locations, *Id.* at 341; (3) The Mount Davidson Cross is not in front of City Hall, adjacent to City Hall, or near any City owned building, *Id.*; (4) The City does not illuminate, adorn or decorate the Mount Davidson Cross, *Id.*; (5) The City does not promote the cross in literature or sponsor the use of Mount Davidson Park for any kind of religious activity, and there are no signs identifying the structure as belonging to the City, *Id.*; (6) The structure is surrounded, or partially obstructed from view, by trees in a residential neighborhood, and that the Sutro television tower nearby, not the Mount Davidson Cross, dominates the western San Francisco skyline, *Id.*; (7) The Mount Davidson Cross

can be properly viewed as one of the works in San Francisco's extensive and varied public art collection, which includes many objects associated with particular religions, such as sculptures of Buddha, Madonna, St. Francis of Assisi, and the collective Holocaust Memorial sculptures, *Id.*; and (8) "The evidence before this Court demonstrates that given the unique historical background surrounding its erection and dedication, the Mount Davidson Cross has attained recognition as a cultural landmark. . . . " *Id.* In addition, the record contained evidence concerning the public's perception of the Mount Davidson Cross. Barely 40% of San Franciscans even know of the cross' existence, and 75% of them do not know that San Francisco owns the Mount Davidson Park.[2]

The District Court declined to apply a "per se" rule, cautioned against the use of sweeping generalities, and recognized that a court must engage in a fact specific analysis of the structure before it. *Id.* at 342. The District Court concluded that "in viewing its unique historical setting in light of controlling precedent," San Francisco's ownership and display of the Mount Davidson Cross does not violate the California Constitution. *Id.* at 344.

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[2] In its Petition for Rehearing, the City asked the Ninth Circuit to take into account a professionally conducted study submitted to the District Court indicating that nearly 40% of San Franciscans were not aware of the structure on Mount Davidson, and nearly 75% were unaware of the City's ownership of the Park. The City's Petition for Rehearing is reproduced at pages App. 50 through App. 60 of the Appendix to the Petition For Writ Of Certiorari.

The Ninth Circuit reversed and remanded. *Carpenter v. City and County of San Francisco*, 93 F.3d 627 (9th Cir. 1996). The Court concluded that (1) as a Latin cross, the Mount Davidson Cross "carries great religious significance"; (2) the structure is visible to a substantial number of people; (3) the display of the Mount Davidson Cross does not include other religious symbols; and (4) the Mount Davidson Cross' history is intertwined with religion. *Id.* at 630-632. Essentially, the Ninth Circuit applied a "per se" rule that a city-owned cross on public land violated the No Preference Clause.

This conclusion conflicts with California law that requires courts to examine each case on its facts to determine whether the structure has historical, cultural, or artistic significance apart from its religious symbolism, and whether the City has promoted or placed its stamp of approval on the structure. Because the Ninth Circuit decided the case on state constitutional grounds, the Court avoided the issue of the Establishment Clause of the United States Constitution.

The City petitioned the Ninth Circuit for a Rehearing, claiming the Court did not apply California precedents, and that it improperly resolved material factual issues in favor of the plaintiffs. The City further argued that even if the Ninth Circuit concluded that summary judgment in favor of the City was not supported by the record, the remedy is a remand for trial, not a resolution of factual issues in favor of the plaintiffs. The Ninth Circuit denied a rehearing.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT HAS RELIED ON ITS OWN JURISPRUDENCE, INSTEAD OF CALIFORNIA LAW, TO HOLD THAT A HISTORICALLY SIGNIFICANT, SIXTY-YEAR-OLD RELIGIOUS SYMBOL ON LAND OWNED BY THE GOVERNMENT VIOLATES THE CALIFORNIA CONSTITUTION'S NO PREFERENCE CLAUSE

In this case, the Ninth Circuit has held that San Francisco must relinquish its sixty-year ownership of the Mount Davidson Cross, a historically, culturally, and artistically significant structure, largely hidden by eucalyptus trees in a remote park far removed from City Hall, and bearing no indicia of government ownership. To reach this result, the Court developed and applied its own jurisprudence under the No Preference Clause, detached from California precedent. The effect is to invalidate under the California Constitution what California courts would have ruled constitutional, and what the District Court has ruled does not violate the Establishment Clause of the United States Constitution.

Simply put, the Ninth Circuit has lost sight of two critical questions in important cases of this kind: (1) Do ordinary people perceive that the government has promoted or placed its stamp of approval on the spiritual content of the symbol? (2) Does the religious symbol have historical, cultural, or artistic significance? *Carpenter* affords an important opportunity for this Court to correct the Ninth Circuit's disregard of a core precept of federalism to honor and follow state law.

This Court has held that an announcement of state law by an intermediate state court must be accepted by federal courts in absence of compelling evidence that the law of the state is otherwise. *Six Companies of California v. Joint Highway District*, 311 U.S. 180, 188 (1940). Even the Ninth Circuit has recognized, in an earlier case involving California's No Preference Clause, that when interpreting state law, a federal court is bound by the decisions of the highest state court. *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991). Federal courts, therefore, must confine their analysis to the proper application of state court precedent in order to maintain fidelity to this important principle of federalism.

In this case, although acknowledging that "California courts remain the wellsprings for state constitutional jurisprudence," *Carpenter*, 93 F.3d at 629, the Ninth Circuit did not in fact apply relevant California cases. In light of (1) the isolated location of the cross, and (2) the historical, cultural, and artistic significance of the structure, as determined by the District Court, no California court could conclude that the City has placed its stamp of approval on the spiritual content of the Mount Davidson Cross. In effect, the Ninth Circuit applied a "per se" rule that prohibits government-owned crosses on government land. Its ruling regarding the unadorned Mount Davidson Cross, surrounded by eucalyptus trees in a park far away from City Hall and any other governmental facility, disregards California precedents in a manner that undermines our federalist system in a substantive area of great importance to our society.

In addition, by purporting to rely on the California Constitution, the Ninth Circuit has also avoided precedents under the Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668 (1984); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989). Thus, granting certiorari is especially important in this case because of the need in our federal system to preserve the integrity of state control over interpretation of state law. By relying on a state constitutional provision, the Ninth Circuit has endeavored to insulate its decision from review, and obviate the need to decide the case under a parallel federal constitutional provision whose interpretation is under this Court's direct control. Under that provision, this Court has rejected "per se" rules regarding a governments' ownership of a religious symbol and also focused on whether government has promoted or given its stamp of approval to the spiritual content of a religious symbol. *Allegheny*, 492 U.S. at 592; *Lynch*, 465 U.S. at 678; *see also Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970).

In this case, in analyzing the No Preference Clause, the Ninth Circuit should have been guided by two California decisions, *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) and *Okrand v. City of Los Angeles*, 207 Cal.App.3d 566 (1989). Both cases require courts to conduct a fact-intensive inquiry in each case involving the No Preference Clause, focusing on (1) whether government has promoted or given its stamp of approval to religion, and (2) whether the object at issue has non-religious historical, cultural, or artistic significance. *Fox*, 22 Cal.3d at 795; *Okrand*, 207 Cal.App.3d at 579-580. Neither case approves the "per se" analysis or mechanistic approach applied in

Carpenter. *Fox*, 22 Cal.3d at 795 (1978); *Okrand*, 207 Cal.App.3d at 579-580.

In *Fox*, plaintiffs challenged Los Angeles' continuing practice of illuminating the windows on City Hall to form a seasonal display in the shape of the cross during the Christmas and Easter season. As *Okrand* later noted, "The lighted cross in *Fox* was 'visible for many miles in many directions, and can be and is viewed by persons driving the freeways. . . . ' " 207 Cal.App.3d at 579. The constitutional problem was not with every governmental association with a religious symbol, but with Los Angeles' conspicuous display of the symbol at the very seat of government during Christian holidays. "The Government may depict objects with spiritual content, but it may not promote or give its stamp of approval to such spiritual content." *Fox*, 22 Cal.3d at 798 (citing *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970)).

Okrand provides an important counterpoint in California law to *Fox*. *Okrand* involved the display in City Hall of the unilluminated Katowitz Menorah. Unlike the cross in *Fox*, but like the Mount Davidson Cross, the Menorah possessed historical, cultural, and artistic, as well as religious, significance. *Okrand* reiterated the *Fox* ruling that governmental depictions of objects of religious significance, without the government's promotion or stamp of approval, do not violate the No Preference Clause. 207 Cal.App.3d at 579. *Okrand* upheld the display of the Menorah by the City of Los Angeles, finding that "[t]he unlit Katowitz Menorah, with its unique historical background, was much more a museum piece than a symbol of religious worship." *Id.* at 580.

Two critical points distinguish *Okrand* from *Fox*. First, the Menorah's display in City Hall did not embody governmental promotion of the symbol or religion. Second, the Menorah possessed significance apart from its religious symbolism. *Carpenter* disregards these distinctions. As with the Katowitz Menorah, the spiritual content of the Mount Davidson Cross does not bear the City's imprimatur. "San Francisco does not illuminate, adorn, or decorate the Mount Davidson Cross. San Francisco does not promote the Cross in literature or encourage or sponsor the use of Mount Davidson Park for any kind of religious activities. There are no signs identifying the Mount Davidson Cross as belonging to the City." *Carpenter*, 803 F.Supp. at 341. Also like the Katowitz Menorah, the Mount Davidson Cross has attained unique historical, cultural, and artistic significance. *Id.* at 348. The structure has become a cultural landmark, and can be viewed as part of San Francisco's extensive and varied public art collection. *Id.*

Ironically, in reversing the District Court, the Ninth Circuit has not only departed from California law, but also from its own precedents. As the court stated in *Ellis v. City of La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2707 (1994):

> The mere fact that the display stands on public property is not enough to call into play the particular locational concerns of Fox and Okrand. In those cases it was the conjunction of religious symbolism with the institutions of government that enhanced the appearance of government endorsement of religion.

Further, the panel in *Carpenter* disregarded the differences recognized in *Ellis* between the San Diego crosses at issue there and the Mount Davidson Cross at issue here.

> The different result in [the District Court decision in] Carpenter highlights the fact-based contextual inquiry required by these kinds of cases. In Carpenter, the district court found that the cross was located in a remote place, was only partially visible on a clear day, did not dominate the horizon when it could be seen, and could not be seen at all at night. As we have already noted, the Mt. Helix Cross can be seen from a substantial distance and sits alone atop one of the highest hills in San Diego County. Moreover, unlike the present case, the cross in Carpenter was shown to have independent historical significance.

Id. at 1526, n.5 (citations omitted).

The Ninth Circuit's departure from its own sound precedent requires this Court's attention. Without certiorari, the danger is real that any association between government and religious symbols will be impermissible in the largest circuit in the nation. *See Separation of Church and State v. Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) ("There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land by the City of Eugene violates the Establishment Clause.")

CONCLUSION

The District Court captured the essence of this case. "In summary, on these facts, the evidentiary record before this Court does not support a conclusion that, by passively allowing the partially visible Mount Davidson Cross to remain unlit at the top of a mountain in a residential district where it has stood for almost six decades, San Francisco is giving its stamp of approval to Christianity or preferring Christianity over other religions in violation of Article 1, Section 4 of the California Constitution." *Carpenter*, 803 F.Supp. at 346. In ignoring these critical facts, and redefining California law in the important arena of religion, the Ninth Circuit has also undermined basic principles of federalism. This Court's review is needed.

Respectfully submitted,

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Victor CARPENTER; Allen Bennett; James Lowder; Richard Spear; Albert C. Walker; Ronald Y. Nakasone; Molleen Matsumura; and Michael Bauman, Plaintiffs-Appellants,

v.

CITY & COUNTY OF SAN FRANCISCO, The San Francisco County Recreation and Park Commission; and Mary Burns, in her official capacity as General Manager of San Francisco County Recreation and Park Department, Defendants-Appellees.

No. 92-16767.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 16, 1994.

Decided Aug. 20, 1996.

Local religious leaders and citizens brought suit against city and related parties challenging city's ownership and maintenance of cross on city property. Parties cross-moved for summary judgment. The United States District Court for the Northern District of California, John P. Vukasin, Jr., J., granted city's motion, and citizens appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that cross violated California Constitution no preference clause.

Reversed and remanded.

Pregerson, Circuit Judge, concurred in result.

Margaret C. Crosby, American Civil Liberties Union Foundation of Northern California, Inc., San Francisco, California, for plaintiffs-appellants.

Mara E. Rosales, Deputy City Attorney, San Francisco, California, for defendants-appellees.

Appeal from the United States District Court for the Northern District of California, John P. Vukasin, Jr., District Judge, Presiding. D.C. No. CV-90-01836-JPV.

Before: LAY,* PREGERSON, and O'SCANNLAIN, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

In this first of two similar cases,[1] we must decide whether the City and County of San Francisco violates the No Preference Clause of the California Constitution by its ownership and display of a 103-foot concrete and steel Latin cross in Mount Davidson Park (the "Mount Davidson Cross").

I

Mount Davidson Park is a roughly 40-acre public park atop Mount Davidson located in and owned by the

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

[1] By a separate published opinion filed today, we also decide the constitutionality, under the Establishment Clause of the United States Constitution, of a 51-foot concrete Latin cross owned and displayed by the City of Eugene, Oregon in a public park on Skinner's Butte. *Separation of Church and State v. City of Eugene*, 93 F.3d 617 (9th Cir.1996).

City and County of San Francisco. Within the Park is a large, unadorned concrete and steel cross which stands 103-feet tall and 39-feet across. A copper box inside the foundation of the Cross contains a number of items including newspapers, telephone directories, two Bibles, two rocks from the Garden of Gethsemane, and a jug of water from the Jordan River. A plaque at the base of the Cross is inscribed with the words "Sunrise Easter Cross/ Mount Davidson/First Service 1923."[2] There are no signs identifying the owner of the Cross.

In 1923, prior to the creation of the Park, the first Easter Sunrise service was held on Mount Davidson. Several wooden crosses were erected for the service, but they were all subsequently destroyed by fire, wind or vandals. In 1932, the City gained title to the land and established Mount Davidson Park. In 1933, the City's Board of Park Commissioners voted to authorize the allocation of public funds to build a permanent cross. The commissioners also authorized the installation of floodlights to illuminate the Cross during Easter. After receiving advice from the City Attorney in 1933 that the Cross would be constitutional under principles applicable at the time (*pre-Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947)), the City went ahead with the project and sought approval from the Art Commission. A noted architect submitted a design for the Cross and

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[2] As plaintiffs request, the court takes judicial notice of the existence of this plaque. Fed.R.Evid. 201. However, the court does not infer any facts beyond the mere fact of the plaque's existence. *See Microsoft Corp. v. BEC Computer Co.*, 818 F.Supp. 1313, 1319 (C.D.Cal.1992).

received the Art Commission's approval. Construction of the Cross was completed in 1934.

In a dedication ceremony held that year, President Franklin D. Roosevelt pressed a golden telegraph key sending a signal from Washington, D.C. through a special direct circuit to illuminate the permanent Mount Davidson Cross. Fifty thousand people attended the event in the Park which took place on the eve of Palm Sunday in order to illuminate the Cross for Easter Week.

Between 1934 and 1987, the Cross was at times illuminated during the week before Easter and during the Christmas season. At other times, it was illuminated nightly. On February 15, 1990, the Board of Park Commissioners passed a resolution halting illumination of the Cross.

Various local religious leaders and citizens of San Francisco (collectively called "Carpenter") brought this suit against the City of San Francisco, its Recreation and Park Commission, and its Manager (collectively called "City"). The suit challenges the City's ownership and maintenance of the Mount Davidson Cross as violating the No Preference Clause and the Ban on Aid to Religion Clause of the California Constitution and the Establishment Clause of the United States Constitution. On cross-motions for summary judgment, the district court entered summary judgment for the City. *Carpenter v. City and County of San Francisco,* 803 F.Supp. 337 (N.D.Cal.1992). Carpenter appealed.

II

Carpenter raises both federal and state constitutional issues. Federal constitutional issues should be avoided when the alternative ground is one of state constitutional law. *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042-43 (9th Cir.1985). Thus, we first turn to the California Constitution to decide this case.

The No Preference Clause of the California Constitution guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference."[3] Cal. Const. art. I, § 4. The contours of the No Preference Clause have been explored by both the California courts and the Ninth Circuit. While this court has had occasion to interpret the No Preference Clause, the California courts remain the wellsprings for state constitutional jurisprudence.

In general, the religion clauses of the California Constitution are read more broadly than their counterparts in the federal Constitution. *See Hewitt v. Joyner*, 940 F.2d 1561, 1566-67 (9th Cir.1991), *cert. denied*, 502 U.S. 1073, 112 S.Ct. 969, 117 L.Ed.2d 134 (1992); *Okrand v. City of Los Angeles*, 207 Cal.App.3d 566, 254 Cal.Rptr. 913, 916 (1989). A plurality of the California Supreme Court has noted:

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[3] In its entirety, Article I § 4 of the California Constitution provides: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion."

> [t]he Attorney General of this state has observed that "it would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion" than that found in the "no preference" clause, and California courts have interpreted the clause as being more protective of the principle of separation than the federal guarantee.

Sands v. Morongo Unified Sch. Dist., 53 Cal.3d 863, 281 Cal.Rptr. 34, 45, 809 P.2d 809 (1991) (lead opinion) (citation omitted), *cert. denied*, 505 U.S. 1218, 112 S.Ct. 3026, 120 L.Ed.2d 897 (1992).

The cases interpreting the No Preference Clause stress the importance of the historical and physical context surrounding a challenged religious display on public property. In the Ninth Circuit's recent encounter with the No Preference Clause (remarkably also involving crosses on public property), the court distilled several factors relevant to determining whether a display violates the California Constitution:

> (1) the religious significance of the display,
>
> (2) the size and visibility of the display,
>
> (3) the inclusion of other religious symbols,
>
> (4) the historical background of the display, and
>
> (5) the proximity of the display to government buildings or religious facilities.

Ellis v. City of La Mesa, 990 F.2d 1518, 1524-25 (9th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2707, 129

L.Ed.2d 834 (1994).[4] These factors are simply a convenient list to guide a court's analysis; they do not form a definitive test utilized by the California courts.[5]

III

In *Ellis*,[6] this court held that San Diego's ownership of the Mount Helix Cross, a 36-foot Latin cross in a public park, and the Mount Soledad Cross, a 43-foot Latin cross in a public park, violated the No Preference Clause. Both crosses could be seen "from a substantial distance." *Id.* at 1520, 1521. Both crosses had been designated historical landmarks. *See id.* The Mount Soledad Cross had also been dedicated as a war memorial. Neither cross was situated with other religious symbols. Neither cross was adjacent to government buildings or religious facilities. *See id.* at 1526. Based on these factors, the *Ellis* court concluded that, in the circumstances presented there, the permanent presence of the crosses on public property violated the No Preference Clause.[7] Because the Mount

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[4] As a threshold matter, it must also be shown that the display is on public property. *See Ellis*, 990 F.2d at 1525. Here, San Francisco does not dispute that the Mount Davidson Cross stands on public property.

[5] The California courts have also occasionally utilized the *Lemon* test, familiar as the traditional analysis under the Establishment Clause of the federal Constitution, not as a controlling framework, but merely as a "touchstone." *Okrand*, 254 Cal.Rptr. at 917 n. 6.

[6] *Ellis* was decided by this court after the district court's summary judgment order.

[7] Under the United States Constitution, the Supreme Court recently upheld the erection of a cross by the Ku Klux Klan on

Davidson Cross is so similar to the Mount Helix and Mount Soledad Crosses, *Ellis* controls our decision in this case.

IV

We now apply the five factors set out in *Ellis* in sequence:

First, the Mount Davidson Cross is a Latin cross. The Latin cross "is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity." *Okrand*, 254 Cal.Rptr. at 922. Christian relics, such as Bibles, rocks from the Garden of Gethsemane, and a jug of water from the River Jordan, are embedded in the Cross' base. Easter Sunrise services and other Christian rituals have long been held at the Cross. In short, the Mount Davidson Cross carries great religious significance. *See Ellis*, 990 F.2d at 1525. Indeed, to suggest otherwise would demean this powerful religious symbol.

Second, the district court observed that "even on a clear day, the Mount Davidson Cross is not visible or partially visible to the naked eye, or identifiable as a cross, from most San Francisco locations." *Carpenter*, 803 F.Supp. at 341. The district court's grant of summary

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government property designated as a public forum. *See Capitol Square Review and Advisory Bd. v. Pinette*, ___ U.S. ___, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995).

judgment is reviewed de novo. *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994).

The record is replete with evidence that contradicts the district court's observation. Even if only the materials submitted by the City are examined, there is ample evidence that the Cross is visible to a substantial number of people. The declaration of defendant Mary Burns, the General Manager of the City's Recreation and Park Department, states that the Cross "has become a familiar structure in the San Francisco landscape." An historical study submitted by the City states: "Clearly visible for miles around the Bay Area, [the Cross] is a prominent feature of the San Francisco landscape." The City submitted a report dated March 18, 1989, prepared by the San Francisco Landmarks Preservation Advisory Board, which states: "[T]he cross on Mount Davidson prominently identifies it not only in the south and west parts of the city but also from locations elsewhere both within and beyond the confines of the city." In its own proposed order submitted to the district court, the City describes the Cross as "a familiar part of the western San Francisco skyline." This litany does not even include any of the ample evidence submitted by Carpenter regarding the Cross' visibility.

In short, the record shows that a significant number of people can see the Mount Davidson Cross.[8] The City's

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[8] It is questionable whether a religious display must be visible from a great distance beyond a public park in order to raise constitutional concerns. Whether the display is visible to users of the public park would seem to be the more relevant inquiry. For example, the religious statuary struck down in

videotaped "Visibility Study" may show that spotting the Cross is difficult on a foggy day; however, constitutional guarantees should not depend on the weather, especially in San Francisco.

Third, the display of the Mount Davidson Cross does not include other religious symbols. Like the Mount Helix and Mount Soledad Crosses, it is a solitary religious display. The fact that San Francisco may have other religious symbols in its art collection spread throughout the City does not minimize the Cross' effect. "The California courts have not looked beyond the immediate area of the display in determining whether other religions are sufficiently represented." *Ellis*, 990 F.2d at 1526.

Fourth, the City contends that the historical significance of the Mount Davidson Cross renders it a permissible religious display. "Even a purely religious symbol may acquire independent historical significance by virtue of its being associated with significant non-religious events." *Ellis*, 990 F.2d at 1526. For example, in *Okrand*, the California Court of Appeal permitted the display of a menorah in Los Angeles City Hall. The particular menorah, known as the Katowitz Menorah, was crafted in a distinctive style and had been saved from the Holocaust. This "unique historical background [rendered it] much more a museum piece than a symbol of religious worship." *Okrand*, 254 Cal.Rptr. at 922.

The district court commented that the Mount Davidson Cross "has stood for fifty-seven years [and] serves as

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Hewitt could not be viewed from beyond the park, but they were very visible within the park. *See Hewitt*, 940 F.2d at 1568.

a reminder of an empirical past." *Carpenter*, 803 F.Supp. at 343. "[The No Preference Clause], however, requires more than mere longevity; a display's historical significance must be *independent* of the display's religious content." *Ellis*, 990 F.2d at 1526 (emphasis added). Rather than having a history independent of its religious significance, the Mount Davidson Cross' history is intertwined with its religious symbolism. The Cross was originally built by the City as a permanent replacement for the crosses that were erected in conjunction with the first Easter Sunrise service on Mount Davidson in 1923. The Cross has a long history as a site for Easter services and other Christian rituals. "This kind of historical significance simply exacerbates the appearance of governmental preference for a particular religion." *Id.*

San Francisco attempts to borrow the history of Mount Davidson and attribute it to the Cross. However, the Cross does not become imbued with the mountain's history merely because it was erected upon it. Mount Davidson will retain its historical significance with or without a cross atop it.

The only arguably non-religious historical event which relates to the Cross is the dedication ceremony in 1934 in which President Franklin D. Roosevelt took part in absentia. However, there is nothing about FDR's transcontinental contact that converts the Cross into an historical relic. Moreover, the secular nature of this event is questionable; the event took place on the eve of Palm Sunday in order to illuminate the Cross for Easter Week.

In contrast to the Mount Davidson Cross, the Mount Helix and Mount Soledad Crosses seem to have had even

stronger historical pedigrees. Both had been declared historical landmarks. *See Ellis,* 990 F.2d at 1526. Both crosses had stood for a longer period of time than the Mount Davidson Cross. *See id.* at 1520-21. In addition, the Mount Soledad Cross had been dedicated as a war memorial in 1954. Nonetheless, the court found that "the mere designation of a display as a 'war memorial' is not enough to satisfy the more separationist No Preference Clause of the California Constitution." *Id.* at 1527.

Moreover, the district court expressed the view that the Cross "has become well recognized as a cultural landmark similar to other notable San Francisco landmarks, like the Golden Gate Bridge, Coit Tower, the Windmill, and the Conservatory of Flowers." *Carpenter,* 803 F.Supp. at 343. This view seems to rest on the mistaken notion that "the longer the violation, the less violative it becomes." *Gonzales v. North Township of Lake County, Ind.,* 4 F.3d 1412, 1422 (7th Cir.1993). In addition, the Mount Helix Cross had similar attributes, to which the *Ellis* court responded: "[T]he fact that the cross also- . . . stands as a prominent landmark and tourist attraction, does nothing to ameliorate a violation of [the No Preference Clause]. If anything, such facts underscore the formidable nature of the display and increase the likelihood of an impermissible appearance of religious preference." *Ellis,* 990 F.2d at 1525.

The district court also observed that the Mount Davidson Cross "can be properly viewed as one of the works of art in [San Francisco's] public art collection." *Carpenter,* 803 F.Supp. at 341. The beauty of the Cross, however, has little bearing on its validity. "It simply is an

attempt to create an aesthetically pleasing religious symbol; it does not obviate its religious purpose." *Gonzales*, 4 F.3d at 1421. In addition, the religious statuary that were found to violate the No Preference Clause by this court in *Hewitt* were certainly artistic. Yet, this court stated that "the argument that a religious display is art or a tourist attraction will not protect the display from restrictions on government-sponsored religion which the people of California have put in their constitution." *Hewitt*, 940 F.2d at 1572.

Fifth and finally, the district court correctly observed that the Mount Davidson Cross is not near City Hall or any other City-owned building, nor is it adjacent to any religious facilities. *Carpenter*, 803 F.Supp. at 341.

In sum, all but one of the five *Ellis* factors counsel that the Mount Davidson Cross violates the No Preference Clause. For California constitutional purposes, the Cross is virtually indistinguishable from the Mount Helix and Mount Soledad Crosses previously invalidated by this court. Thus, we conclude that the Mount Davidson Cross' presence on public land violates the No Preference Clause of the California Constitution. Because we hold that the Cross violates the No Preference Clause, we need not reach Carpenter's other claims under the California Constitution or the United States Constitution.

V

The district court's grant of summary judgment for the City is reversed and the case is remanded to the district court for fashioning of appropriate relief. *See Ellis*, 990 F.2d at 1529.

REVERSED and REMANDED.

PREGERSON, Circuit Judge, concurring in the result:

Because *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2707, 129 L.Ed.2d 834 (1994), controls the disposition of this case, I concur in the result.

Victor CARPENTER, et al., Plaintiffs,

v.

The CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.

No. C-90-1836-JPV.

United States District Court, N.D. California.

Sept. 11, 1992.

City residents filed complaint alleging that city's ownership and display of Latin cross in public park infringed on their rights under California and Federal Constitutions. On cross motions for summary judgment, the District Court, Vukasin, J., held that: (1) city's ownership and display of cross did not violate clause of California Constitution guaranteeing the free exercise and enjoyment of religion without discrimination or preference; (2) city's ownership and display of cross did not violate the ban on aid to religion clause of California Constitution; and (3) city's ownership and display of cross did not violate establishment clause of United States Constitution's First Amendment.

Defendants' motion granted; plaintiffs' motion denied.

Thomas Steel, Steel, Clarence & Buckley, Americans United for Separation of Church and State, Fred Blum, American Jewish Congress, Margaret C. Crosby, American Civ. Liberties Union Foundation of Northern California, Inc., San Francisco, Cal., for plaintiffs.

Louise H. Renne, City Atty., Dennis Aftergut, Chief Asst. City Atty., Burk E. Delventhal, Mara E. Rosales, Arthur R. Greenberg, Deputy City Attys., San Francisco, Cal., for defendants.

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

VUKASIN, District Judge.

I. INTRODUCTION

The cross-motions of the parties for summary judgment came on regularly for hearing on January 16, 1992, before the Honorable John P. Vukasin, Jr., United States District Judge. Thomas Steel, Esq., Margaret Crosby, Esq., Fred Blum, Esq., and John Beattie, Esq. appeared for plaintiffs. Louise H. Renne, City Attorney, by Deputy City Attorneys Mara E. Rosales and Arthur R. Greenberg, appeared for defendants.

The Court has considered the complaint filed in the instant action, the affidavits filed in support of and in opposition to the cross-motions, all of the evidence submitted to the Court by the parties and the arguments of counsel.

The parties are asking this Court to rule that there is no genuine issue of a material fact and each of the respective moving parties is entitled to judgment as a matter of law.

Summary judgment, where appropriate, is a favored method of resolution. When a properly supported motion for summary judgment is made, the adverse party must

step forth and state specific facts showing there is, in fact, a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). In ruling on the cross-motions for summary judgment, the Court is required to interpret the evidence and justifiable inferences in the light most favorable to the opposing party. *Id.*, at 255, 106 S.Ct. at 2513-14. Given that there is no genuine issue of material fact in dispute in this case, the Court considers the parties' cross-motions for summary judgment as a matter of law.

II. NATURE OF ACTION

This action concerns the presence of a Latin Cross in a public park owned and maintained by the City and County of San Francisco atop Mount Davidson. On June 28, 1990, plaintiffs, various residents of San Francisco, filed a complaint in this Court against defendants, the City and County of San Francisco, the San Francisco Recreation and Park Commission and Mary Burns, General Manager of the Recreation and Park Department ("S.F."). Plaintiffs allege that S.F.'s ownership and maintenance of the Mount Davidson Cross violates the First and Fourteenth Amendment to the United States Constitution by infringing on their right to be free from government establishment of religion. Plaintiffs also allege injuries under the California Constitution. Specifically, they allege that S.F.'s conduct violates Article I, Section 4 and Article XVI, Section 5 of the California Constitution.

III. FINDINGS OF FACT

A. Historical significance

San Francisco, through its Recreation and Park Commission ("the Commission"), owns the land commonly known as Mount Davidson, a 39.42 acre public park. San Francisco gained full title to the land of Mount Davidson Park in 1932.

In 1923, prior to municipal ownership, the first Easter Sunrise service was held on Mount Davidson. In conjunction with this service, several wooden crosses were erected, and each was successively destroyed. After S.F. gained ownership, the Board of Park Commissioners voted to authorize the allocation of city funds to build a permanent cross atop Mount Davidson. The commissioners also authorized the installation of floodlights, to be illuminated during Easter.

The historical records[1] in this case reflect that S.F. built the Mount Davidson Cross as a public monument and work of art. In about May of 1933, the Finance Committee of the San Francisco Board of Supervisors requested advice from the San Francisco City Attorney on whether appropriating city funds for the erection of a permanent cross on Mount Davidson was legal.

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[1] A detailed discussion of the history of the Mount Davidson Cross is set forth in Exhibit 2 of the Declaration of Marie Bolton, entitled "The Contemplative Ideal in Public Space: The Cross at Mt. Davidson Park, San Francisco, 1923-1990."; [*see also* Exhibits 1, 2, 3 to Decl. of Rosales.]

Relying on the then relevant decisions interpreting the California Constitution,[2] the City Attorney advised the Board of Supervisors that the proposal to erect a cross on park property was constitutional. However, recognizing that the proposal called for the erection of a structure deemed a work of art by the people of San Francisco under the San Francisco Charter, the City Attorney advised that Art Commission approval of the design and location of the monument was required prior to its erection or placement on city property. San Francisco heeded the advice of its legal counsel.

About August 1933, the Park Commission retained a noted architect, George W. Kelham, to design the cross. Mr. Kelham submitted the design and model of the cross to the Art Commission for its approval. On September 12, 1933, the Art Commission approved the design, model and proposed location of the cross on Mount Davidson. Thereafter, the project proceeded in the same manner as any public works contract – the contracts for construction and flood lighting of the cross were awarded to the lowest responsible bidder after a competitive bid process was undertaken.

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[2] At the time the City decided to construct the Mount Davidson Cross in 1934, the Establishment Clause of the United States Constitution did not apply to the states. It was not until 1947, fourteen years after the Cross had been built, that the U.S. Supreme Court held in *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), that the Establishment Clause of the U.S. Constitution was applicable to the states via the Fourteenth Amendment. The California Constitution's Establishment Clause was not added to the California law until 1974, 40 years after the Cross was constructed.

The construction of the Mount Davidson Cross was completed in 1934. The cross is a large, unadorned concrete and steel structure, which stands 103 feet tall and 39 feet across. The Mount Davidson Cross is a plain, latin cross, "having a long upright shaft with a shorter crossbar traversing it above the middle."[3] In a dedication ceremony in 1934, President Franklin D. Roosevelt participated in a civic-minded celebration by pressing a golden telegraph key sending a signal from Washington, D.C., through a special direct circuit provided by Western Union to illuminate the Mount Davidson Cross. Estimates of the size of the crowd at the dedication ceremony range as high as 50,000 people. A copper box is inside the foundation of the structure. It contains newspapers, telephone directories, two Bibles, two rocks from the Garden of Gethsemane, a jug of water from the Jordan River, and other items.

Between 1934 and 1987, the Mount Davidson Cross was at times illuminated during the week before Easter and sometimes during the Christmas season. At other times, the Mount Davidson Cross was illuminated nightly. Over the past three years, plaintiffs, and other persons concerned, made repeated requests that S.F. cease its ownership and illumination of the Mount Davidson Cross. On February 15, 1990, in direct response to continued appeals, the Commission decided to retain the Mount Davidson Cross and the land on which it stands, but to refrain from ever illuminating the cross again. Following the Commission's decision, plaintiffs filed this action.

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[3] Webster's Third New International Dictionary of the English Language Unabridged, p. 1276 (1976).

B. Physical Setting

The Recreation and Park Department ("the Department") currently spends no resources to maintain the Mount Davidson Cross. Mount Davidson Park is maintained as an urban eucalyptus forest and is used as an open space natural area – akin to a wilderness setting. Mount Davidson Park is located in western San Francisco, far away from City Hall.

The record reflects that even on a clear day, the Mount Davidson Cross is not visible or partially visible to the naked eye, or identifiable as a cross, from most San Francisco locations. In locations where the Mount Davidson Cross is visible, the naked eye sees a structure in the form of a cross at the top of a hill surrounded by, or partially obstructed from view by, trees in a residential neighborhood in close proximity to Sutro Tower,[4] which is more than nine times taller. Sutro Tower, not the Mount Davidson Cross, dominates the western San Francisco horizon.

San Francisco does not illuminate, adorn, or decorate the Mount Davidson Cross. San Francisco does not promote the Cross in literature or encourage or sponsor the use of Mount Davidson Park for any kind of religious activities. There are no signs identifying the Mount Davidson Cross as belonging to the city. The Mount Davidson Cross cannot be seen at night. The Mount

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[4] Sutro Tower is a large, plain, unadorned televison transmitter located atop a hill in the western part of San Francisco.

Davidson Cross is not in front of City Hall, adjacent to City Hall, or near any other City-owned building.

C. Cultural Aspects

The Mount Davidson Cross can be properly viewed as one of the works of art in S.F.'s public art collection. The cross' design, crafted by a noted architect, was approved by the Art Commission pursuant to the city Charter. San Francisco's public art collection is extensive and extremely varied, and includes many monuments, sculptures and murals on city buildings. The collection also includes many objects associated with particular religions, such as sculptures of Buddha, Madonna, and St. Francis of Assisi, the patron saint for whom San Francisco is named, as well as the collective Holocaust Memorial sculptures. Art and cultural heritage are inextricably intertwined throughout S.F.'s public art collection. The evidence before this Court demonstrates that given the unique historical background surrounding its erection and dedication, the Mount Davidson Cross has attained recognition as a cultural landmark, often associated with other notable San Francisco landmarks, such as Coit Tower, the Conservatory of Flowers, the Windmill, and the Golden Gate Bridge.[5]

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[5] This Court takes judicial notice of the private commercial advertisements, books and maps submitted by S.F. which depict the Mount Davidson Cross along with other prominent San Francisco landmarks.

IV. CONCLUSIONS OF LAW[6]

A. Overview

As the facts outlined above indicate, the original and contemporary history, landmark quality, geographic location and physical setting of the Mount Davidson Cross offer this Court an entire range of characteristics never discussed in any other judicial decisions. In analyzing the various court decisions that offer guidance to this Court on interpreting both the California and United States Constitutions, one common thread arises and forms the basis for this Court's evaluation of the Mount Davidson Cross: This Court must avoid using sweeping generalities, but rather must engage in a careful, detailed, and factually serious examination of the entire context of the particular structure before it.

The Ninth Circuit has established procedures for adjudicating federal cases involving California state constitutional issues. *See Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir.1991). In this Circuit, federal constitutional issues should be avoided when the alternative ground is one of state constitutional law. *Id.* at 1565. Following this rule, when interpreting state law, a federal court is bound by the decision of the highest state court. *Id.*

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[6] To the extent any of the Conclusions of Law are or may be deemed to be findings of fact, they are hereby referred to and made a party of those facts as fully as though set out in the Findings of Fact.

B. California Constitution

The California Constitution guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference. . . . " Article I, Section 4. This provision is known as the "no preference" clause. *See Okrand v. City of Los Angeles*, 207 Cal.App.3d 566, 579, 254 Cal.Rptr. 913 (1989). The California Constitution also prohibits S.F. from making "an appropriation, or to pay from any public fund whatever, or to grant anything to or in aid of any religious sect, church, creed, or sectarian purpose." Article XVI, Section 5 (The 'ban on aid to religion' clause).

1. The No Preference Clause

The leading, and most closely related, California Supreme Court case interpreting the "no preference" clause of the California Constitution is *Fox v. City of Los Angeles*, 22 Cal.3d 792, 150 Cal.Rptr. 867, 587 P.2d 663 (1978).[7] In *Fox*, the California Supreme Court affirmed an order enjoining the thirty-year practice by the City of Los Angeles of illuminating a huge, single-barred cross on City Hall during the Christmas holidays, and enjoining the eight-year practice of illuminating the cross on Easter Sundays, both Latin and Eastern Orthodox.

However, the Supreme Court did not consider or adopt a simple "per se" rule, as the one being advanced by plaintiffs, that the mere existence of a publicly owned

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[7] The majority in *Fox* only addressed the "no preference" clause, Article I, Section 4, of the California Constitution. The majority did not address the merits of the case under the "ban on aid to religion" clause, Article XVI, Section 5.

cross on public land violates the California Constitution. To the contrary, by its own clear statement, "[o]ur case is marked by the location, size, and visibility of the Los Angeles cross, and also by the additional facts we discuss below [which indicate that the real purpose of the city's display was a religious one]." *Id.* 22 Cal.3d at 795, 150 Cal.Rptr. at 869, 587 P.2d at 665. Analyzing these factors, the cross at issue in *Fox*, which was illuminated on city hall and visible for many miles in many directions, was found to violate the no preference clause of the California Constitution.

The Supreme Court noted that "[i]n the California Constitution there is no requirement that each religion always be represented." *Fox*, 22 Cal.3d at 795, 150 Cal.Rptr. at 869, 587 P.2d at 665. Rather, " '[t]he Government may depict objects with spiritual content, but it may not promote or give its stamp of approval to such spiritual content.' " *Id.* 22 Cal.3d at 797, 150 Cal.Rptr. at 870, 587 P.2d at 666, *citing Allen v. Hickel*, 424 F.2d 944, 948 (D.C. Cir.1970). The *Fox* cross promoted such spiritual content by giving it the stamp of governmental approval through the illumination on city hall. Thus, *Fox* illustrates a rejection of an analysis that focuses exclusively upon the structure, without examining whether that structure, in its full context, actually promotes religion.

The Mount Davidson Cross differs greatly from the cross at issue in *Fox*. First, and most importantly, the *Fox* cross was illuminated on city hall, thereby giving it the official stamp of governmental approval. The Mount Davidson Cross, on the other hand, is not illuminated, and is not on, in front of, adjacent to, or even near city hall, or near any city owned building. Moreover, there are

no signs identifying the Mount Davidson Cross as belonging to the city. Second, the *Fox* cross was highly visible for many miles in many directions, whereas the Mount Davidson Cross is located in a relatively remote place, and is only partially visible on a clear day, and can not be seen at night. Therefore, given its physical setting, the Mount Davidson Cross, unlike the *Fox* cross, in no way suggests government endorsement of, or preference for, religion, in violation of Article I, Section 4, of the California Constitution.

The importance of examining the context of a religious display to determine whether it violates the "no preference" clause was further recognized in *Okrand v. City of Los Angeles*, 207 Cal.App.3d 566, 254 Cal.Rptr. 913 (Cal.App. 2 Dist.1989). In *Okrand*, the court was faced with a challenge to the display of an unlit menorah in the rotunda of the Los Angeles City Hall. Analyzing the context of the menorah at issue in *Okrand*, the court easily distinguished it from the cross at issue in *Fox*. The *Okrand* court compared the lighted cross in *Fox*, which "was highly visible for many miles in many directions," with the menorah, which "stood unlit in a corner of the [city hall] rotunda." *Id.* Moreover, the *Okrand* court recognized the importance of that particular menorah's "unique historical background."[8] Based on these factors, the court concluded "that in the context in which it allowed the

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[8] The menorah in *Okrand* was crafted in the 19th Century by an Italian artist, and remained in the Great Synagogue of Katowitz in Poland until World War II. *See Okrand*, 254 Cal.Rptr. at 914.

Katowitz Menorah to be displayed, the city exhibited no preference for the Jewish religion nor promoted it." *Id.*

Applying this context outlook to this case, the Mount Davidson Cross is as similar to the *Okrand* menorah as it is different from the *Fox* cross. Visible for many miles in many directions, the *Fox* cross was brightly illuminated on city hall giving it the official stamp of governmental approval, and bore no specific historical significance. The *Okrand* menorah, on the other hand, while placed in city hall, was unlit and carried a unique historical background. In comparison, the Mount Davidson Cross stands unilluminated in a remote area of the city, and is only partially visible on a clear day. Additionally, the quality and significance of the Mount Davidson Cross' historical and cultural heritage, while different from that in *Okrand*, is comparable on a local level. As discussed earlier in this opinion, the Mount Davidson Cross was designed by a noted architect as a work of art under the city Charter. Additionally, the President of the United States, Franklin D. Roosevelt, participated in the dedication ceremony when he pressed a golden telegraph key sending a signal from Washington, D.C. through a special direct circuit provided by Western Union to illuminate the cross. Moreover, the cross, which has stood for fifty-seven years, serves as a reminder of an empirical past, and has become well recognized as a cultural landmark similar to other notable San Francisco landmarks, like the Golden Gate Bridge, Coit Tower, the Windmill, and the Conservatory of Flowers. Thus, given the context in which the Mount Davidson Cross is displayed, the city, as in *Okrand*, exhibits no religious preference.

The leading Ninth Circuit case to analyze the California "no preference" clause is *Hewitt v. Joyner,* 940 F.2d 1561 (9th Cir.1991). *Hewitt* involved a challenge to San Bernadino County's ownership and maintenance of a public park that contained exclusively immovable religious statues depicting scenes from the New Testament. Interpreting *Fox* and *Okrand,* the Ninth Circuit undertook a fact-specific contextual analysis of the physical and historical setting of the park, and held: "When viewed in its entire historical context, the County's ownership of the park depicts a government-endorsement of the Christian faith." *Id.* at 1569.

The entire historical context of the Mount Davidson Cross, however, is easily distinguishable from the statuary park at issue in *Hewitt.* After taking ownership of the statuary park in *Hewitt,* the County dedicated it as "Desert Christ Park." The county "printed brochures which identify each of the statuary scenes by reference to Bible passages." *Id.* at 1563. This official brochure also described the statuary located on the church property adjoining the park, and described these statues as being part of the park. "In fact, the largest of the park's statues, the Last Supper tableau, straddles the property line of the church and the park." *Id.* Moreover, the public park was advertised in the telephone directory as a "World Famous Theme Park . . . depicting life of Christ." *Id.* In this context, the Ninth Circuit found that "[t]he effect and message of the park is a religious one."

In contrast, S.F. does not endorse the Mount Davidson Cross, or any message that it may send, in any manner. It does not highlight the structure in tourist literature, or promote or emphasize it in any way. The

Mount Davidson Cross is not identified as belonging to the city. San Francisco does not advertise the park as a religious theme park, nor is there an official brochure referencing biblical passages or providing general religious messages.

Additionally, the location of the Mount Davidson Cross in no way suggests governmental endorsement of, or preference for, religion in general, or Christianity in particular. The Mount Davidson Cross is not in close proximity to a church and in no way is it associated with a church. The *Hewitt* biblical statuary park, on the other hand, was geographically located next to a church and the statues were commingled with church property, thereby emphasizing its religious nature and effect. Furthermore, the park atop Mount Davidson was not dedicated and named a religious theme park, but rather, as described above, has rich historical significance. The *Hewitt* biblical statuary park, in contrast, was a bequest to the government, did not evolve from historical events, and could make no legitimate claim to historical significance. Rather its name, "Desert Christ Park," merely signifies its religious message. Thus, when viewed in its historical context, S.F.'s ownership of the Mount Davidson Cross, unlike the biblical statuary Park in *Hewitt*, does not depict a government-endorsement of the Christian faith.

Therefore, in viewing its unique historical and physical setting in light of the controlling precedent, S.F.'s ownership and display of the Mount Davidson Cross does not violate the no preference clause of Article I, Section 4 of the California Constitution.

2. The Ban on Aid to Religion Clause

"In addition to the no preference clause in Article I, Section 4, the California Constitution [Art. XVI, § 5] includes a broad ban on the use of public property or funds to support religious purposes." *Hewitt*, 940 F.2d at 1569. Article XVI, Section 5 "preclude[s] the spending of any public money to directly support any religious group." *Fox v. City of Los Angeles*, 22 Cal.3d 792, 800, 150 Cal.Rptr. 867, 872, 587 P.2d 663, 668 (1978) (Bird, C.J. concurring) (emphasis in the original).[9] This clause "forbids all forms of governmental aid to religion, whether that aid be in the tangible form of cash or in the intangible form of prestige and power." *Id.* 22 Cal.3d at 802, 150 Cal.Rptr. at 873, 587 P.2d at 669 (Bird, C.J., concurring), citing *California Educational Facilities Authority v. Priest*, 12 Cal.3d 593, 604-05, 116 Cal.Rptr. 361, 369, 526 P.2d 513, 521 (1974). Additionally, " 'the fact that a statute has some identifiable secular objective will not immunize it from further analysis to ascertain whether it also' directly and substantially advances religion." *Fox*, 22 Cal.3d at 802, 150 Cal.Rptr. at 873, 587 P.2d at 669 (Bird, C.J. concurring), *quoting Priest*, 12 Cal.3d at 604-05, 116 Cal.Rptr. at 369, 526 P.2d at 521.

The leading Ninth Circuit case interpreting Article XVI, Section 5, and the relevant California cases, is *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir.1991). In *Hewitt*, the Ninth Circuit found that the ban on aid to religion clause forbids taxpayer support of the biblical statuary park owned

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[9] The majority in *Fox* did not address the application of Article XVI, Section 5 to the merits of the case. *See, supra*, footnote 3.

and maintained by the County of San Bernadino. Specifically, the facts indicated that the County paid for the maintenance of the statues, advertised the park in the phone book, and printed brochures, all at the taxpayers' expense. The Ninth Circuit concluded that "the California people have written their constitution to guard against exactly this type of situation."

In the case *sub judice*, however, there is no expenditure of taxpayers funds in support of or in aid of religion in violation of Article XVI, Section 5. The challenge in this case is to S.F.'s ownership of the Mount Davidson Cross, and to the display of the Mount Davidson Cross on public lands. In this case, unlike in *Hewitt*, S.F. does not spend any money to maintain the Mount Davidson Cross. Nor does it advertise the Mount Davidson Cross, or print brochures, or spend any money to support the Mount Davidson Cross at the taxpayers expense.[10]

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[10] In the opinion of Chief Justice Bird in *Fox v. City of Los Angeles*, 22 Cal.3d 792, 150 Cal.Rptr. 867, 587 P.2d 663 (1978), "the prohibitions of Article XVI, section 5 would come into play even if no funds were expended." *Id.* 22 Cal.3d at 806, 150 Cal.Rptr. at 876, 587 P.2d at 672 (Bird, C.J. concurring). However, in as much as the opinion is a concurrence, and Chief Justice Bird was the only Justice to reach the issue as it relates to Article XVI, section 5, it is mere dicta. Moreover, the leading California and Ninth Circuit cases finding a violation of Article XVI, section 5, involved the expenditure of public funds, unlike this case. *See, e.g., County of Los Angeles v. Hollinger*, 221 Cal.App.2d 154, 34 Cal.Rptr. 387 (1963); *Frohliger v. Richardson*, 63 Cal.App. 209, 218 P. 497 (1923); *California Teachers Association v. Riles*, 29 Cal.3d 794, 176 Cal.Rptr. 300, 632 P.2d 953 (1981); *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir.1991).

The Ninth Circuit, in *Hewitt*, further recognized the development of a two-part test in recent California Supreme Court precedent for determining if a government practice violates the ban on aid to religion clause. See *Hewitt*, 940 F.2d at 1571, *citing California Teachers Association v. Riles*, 29 Cal.3d 794, 176 Cal.Rptr. 300, 632 P.2d 953 (1981). Under the *Riles* test, a court must consider " 'whether the aid is direct or indirect, and second whether the nature of the aid is substantial or incidental.' " *Hewitt*, 940 F.2d at 1571, *quoting Sands v. Morongo Unified School District*, 53 Cal.3d 863, 281 Cal.Rptr. 34, 809 P.2d 809 (1991) (Mosk, J. concurring) (citation omitted).

Applying the two-part *Riles* test in *Hewitt*, the Ninth Circuit found that the biblical statuary park violated the ban on aid to religion clause. Specifically, the court found that the County' support of the park, holding the deed and paying for its maintenance, was clearly direct. Furthermore, the financial support given by the County and the religious preference exhibited by the display more than incidentally benefitted the religious view symbolized by the park's statuary.

Contrary to the biblical statuary in *Hewitt*, there is no direct aid to the Mount Davidson Cross by S.F. At most, any indirect benefit to religion results from the display of the Mount Davidson Cross on public property. However, the same indirect benefit would result if S.F. were to authorize a religious group a permit to hold a holiday observance at the park atop Mount Davidson, an act which can not be said to be unconstitutional under Article XVI, Section 5. Furthermore, because no financial support is provided, and because no religious preference

is exhibited,[11] S.F.'s ownership and display of the Mount Davidson Cross, at most, incidentally benefits the religious view symbolized. Thus, the Mount Davidson Cross survives constitutional scrutiny under the two-prong *Riles* test.

Therefore, S.F.'s ownership of the Mount Davidson Cross does not violate the ban on aid to religion clause of Article XVI, Section 5 of the California Constitution.

3. Conclusion

In summary, on these facts, the evidentiary record before this Court does not support a conclusion that, by passively allowing the partially visible Mount Davidson Cross to remain unlit at the top of a mountain in a residential district where it has stood for almost six decades, San Francisco is giving its stamp of approval to Christianity or preferring Christianity over other religions in violation of Article I, Section 4 of the California Constitution. Nor can it be held that San Francisco is granting aid, money or support to religion in violation of Article XVI, Section 5 of the California Constitution.

C. The United States Constitution

1. Overview

The most significant recent United States Supreme Court opinion on point is *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106

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[11] *See* earlier discussion at pp. 342-44.

L.Ed.2d 472 (1989). It is significant for a number of reasons, not only for its content, but also because Justice Blackmun announced the judgment and delivered the opinion of the court; an opinion in which Justice O'Connor concurred in part, concurred in the judgment, and filed an opinion in which Justices Brennan and Stevens joined in part. Justice Brennan concurred in part and dissented in part and filed an opinion joined by Justices Marshall and Stevens. Additionally, Justice Stevens concurred in part and dissented in part, and filed an opinion joined by Justices Brennan and Marshall. And lastly, Justice Kennedy concurred in the judgment and dissented in part and filed an opinion joined by Chief Justice Rehnquist and Justices White and Scalia. With this "clear and binding" precedent, this Court is now charged with the task of determining what is constitutional and what is not, and specifically, whether S.F.'s ownership and display of a Latin Cross in the public park atop Mount Davidson violates the First Amendment to the United States Constitution. After considering all of the evidence presented by the plaintiffs and the defendants, this Court holds that San Francisco's ownership and display of the Mount Davidson Cross does not violate the U.S. Constitution.

2. Standard of Review

The First Amendment to the U.S. Constitution begins "Congress shall make no law respecting an establishment

of religion."[12] The Establishment Clause, however, does not mandate total separation between government and religion. The history of the United States is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements. Government has recognized and subsidized holidays, such as Christmas and Thanksgiving, with religious significance. *See Lynch v. Donnelly*, 465 U.S. 668, 675, 104 S.Ct. 1355, 1360, 79 L.Ed.2d 604 (1984). Other examples concerning our countries rich religious heritage include the statutorily prescribed national motto "In God We Trust", 36 U.S.C. 186, and "One nation under God", 36 U.S.C. 172, as part of the Pledge of Allegiance. In addition, the National Gallery of Art, in Washington, DC, maintained with government support, has exhibited masterpieces with religious messages. Even the U.S. Supreme Court displays a permanent symbol of religion, as a tableau of Moses with the Ten Commandments hangs prominently in the Court's Chamber. *See Lynch*, 465 U.S. at 676-77, 104 S.Ct. at 1360-61.

Given our nation's strong religious history, the Supreme Court has stated that it "has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization." *Allegheny*, 492 U.S. at 573, 109 S.Ct. at 3086. In analyzing cases challenging the constitutionality of a government practice under the Establishment Clause,

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[12] The Establishment Clause became applicable to the states by the fourteenth amendment in 1947, *see Everson*, 330 U.S. at 5, 67 S.Ct. at 506, and thus, was not applicable when S.F. decided to erect the Mount Davidson Cross in 1934.

"the inquiry calls for line-drawing; no fixed, per se rule can be framed." *Lynch*, 465 U.S. at 678, 104 S.Ct. at 1361 (emphasis in the original). In order to facilitate this "line-drawing process," *id.* at 679, 104 S.Ct. at 1362, the Supreme Court, in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), enunciated a three prong test for determining whether a government practice violates the Establishment Clause.

> Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion.

Allegheny, 492 U.S. at 591, 109 S.Ct. at 3100, *citing Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111. However, the Supreme Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679, 104 S.Ct. at 1362 (and cases cited therein). See also, *Allegheny*, 492 U.S. at 590, 109 S.Ct. at 3099 (" 'the myriad, subtle ways in which Establishment Clause values can be eroded' are not susceptible to a single verbal formulation.") (citation omitted).

With this understanding, this Court declines to take a rigid or absolutist approach in applying the *Lemon* test to this case.[13] *See Cammack v. Waihee*, 932 F.2d 765, 773 (9th Cir.1991).

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[13] As Justice Kennedy so eloquently stated:

> I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating . . . [this] test as the primary guide

3. The *Lemon* Test

(a). *Secular Purpose*

The first prong of the *Lemon* test requires that the government practice at issue has a secular purpose. *Lemon*, 403 U.S. at 612, 91 S.Ct. at 2111. Recently, the United States Court of Appeals for the Ninth Circuit in *Cammack v. Waihee*, 932 F.2d 765 (9th Cir.1991) defined the standard applicable to determining whether a government practice violates the purpose prong of *Lemon*:

> The purpose prong is clearly violated when there is no legitimate secular purpose for the [government practice]. . . . When there are both religious and legitimate, sincere secular purposes motivating [the government practice], it appears that the existence of the secular purpose will satisfy the first *Lemon* prong.

> in this difficult area. Persuasive criticism of *Lemon* has emerged. [Supreme Court] cases often question its utility in providing concrete answers to Establishment Clause questions, calling it but a " 'helpful signpos[t]' " or " 'guidelin[e]' ", to assist our deliberations rather than a comprehensive test. [The Supreme Court has] repeatedly emphasized [its] unwillingness to be confined to any single test in this sensitive area. Substantial revision of the Establishment Clause doctrine may be in order; but . . . even the *Lemon* test, when applied with the proper sensitivity to our traditions and our caselaw, supports the conclusion [reached by this Court] . . .

that the City's ownership and display of the Mount Davidson Cross is permissible under the Establishment Clause. *Allegheny*, 492 U.S. at 655, 109 S.Ct. at 3134 (Kennedy, J., joined by the Chief Justice, White, J., and Scalia, J., concurring in the judgment in part and dissenting in part) (citations and quotations omitted).

Id. at 773. Thus, a government practice violates the purpose prong "only if it is motivated wholly by an impermissible purpose." *Bowen v. Kendrick*, 487 U.S. 589, 602, 108 S.Ct. 2562, 2570, 101 L.Ed.2d 620 (1988) *quoted in Cammack*, 932 F.2d at 774.

Applying this standard, S.F.'s ownership and display of the Mount Davidson Cross easily passes constitutional muster under the first prong of the *Lemon* test. Based on the evidentiary record before this Court, this Court finds that San Francisco's ownership and maintenance of the Mount Davidson Cross is not "motivated wholly by an impermissible purpose," and thus, does not violate the secular purpose prong of *Lemon*.[14]

The evidence in this case demonstrates that San Francisco possessed a legitimate, secular purposes for constructing the Mount Davidson Cross in 1934. Historical records reveal that the idea of constructing a structure in the form of a cross on Mount Davidson was not originated by the city. The Mount Davidson Cross was the idea of James Decatur, who was an official of Western Union, a director of the YMCA and an active member of the Episcopal Church.

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[14] "In reviewing a challenged [practice] for a secular purpose, [this Court] must be 'reluctant to attribute unconstitutional motives to the [city's], particularly when a plausible secular purpose for the [city's practice] may be discerned . . . ' " *Cammack*, 932 F.2d at 774, *quoting Mueller v. Allen*, 463 U.S. 388, 394-95, 103 S.Ct. 3062, 3066-67, 77 L.Ed.2d 721 (1983).

While there is evidence that Decatur was a deeply religious man and his idea of erecting the Mount Davidson Cross was motivated at least in significant part by religious reasons, there is virtually no evidence that city leaders shared Decatur's religious motivation. Indeed, the historical evidence indicates that S.F. embraced the project cautiously, proceeding with the construction of the Mount Davidson Cross only after seeking advice of legal counsel, and approval by the Art Commission. As set forth earlier in this opinion, historical records reflect that S.F. built the Mount Davidson Cross as a public monument and work of art, not as an endorsement of Christianity or any particular sect. The historical evidence establishes that S.F.'s subjective intent in constructing the Mount Davidson Cross was to erect and place a work of art in a neighborhood park seen as an ideal place for contemplation and nature loving activities.

Based on the evidentiary record before this Court, this Court cannot conclude that the sole purpose of the Cross was to advance religion or that the construction of the Cross was initiated by concerns that were solely religious in nature. Thus, this Court concludes that S.F.'s action in erecting the Mount Davidson Cross "had at least a legitimate purpose." *Cammack*, 932 F.2d at 776.[15]

Even if the Court were to conclude that S.F.'s actual motivation for erecting the Mount Davidson Cross was

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[15] "The narrow question is whether there is a secular purpose for [San Francisco's] display of the [Mount Davidson Cross]," *Lynch*, 465 U.S. at 681, 104 S.Ct. at 1363, not that the purpose of the display is "exclusively secular." *Id.* at 682, n. 6, 104 S.Ct. at 1363, n. 6.

solely for religious purposes, which it does not, this conclusion would not "compel a finding of improper purpose now, some fifty[-seven] years later." *Cammack*, 932 F.2d at 776. Presently, as the evidence suggests, the Mount Davidson Cross is owned as a work of art and cultural landmark. It was designed by a noted architect and approved by the Art Commission as a work of art pursuant to the city Charter. The Mount Davidson Cross can be viewed as part of S.F.'s public art collection, which also contains many other objects associated with different religions, such as sculptures of Buddha, Madonna, and St. Francis of Assisi, the patron saint for whom San Francisco is named. Additionally, given the unique background surrounding its erection and dedication, as discussed earlier in the opinion, the Mount Davidson Cross has attained both cultural and historical value. Since the Mount Davidson Cross has cultural, historical and artistic significance as a landmark and work of art, S.F.'s ownership and maintenance of the Cross presently serves a secular purpose.

Based on all the evidence in the record before this Court, this Court concludes that S.F.'s stated secular purpose in owning and maintaining the Mount Davidson Cross is both legitimate and sincere, "and not a sham." *Cammack*, 932 F.2d at 774.

Plaintiffs, citing "an unbroken line of eight federal court cases,"[16] argue that the display of the latin cross, as

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[16] See, e.g., *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir.1983) (85 foot cross in public park); *Greater Houston Chapter of ACLU v. Eckels*, 589 F.Supp. 222 (E.D.Tex. 1984) (erection of three cross [sic] and a

the pre-eminent symbol of Christianity, does not have a secular purpose. However, plaintiffs' emphasis on the fact that the latin cross is the pre-eminent symbol of Christianity is misguided. The inquiry under the first prong of the *Lemon* test is not whether the cross is a religious symbol, as it undoubtedly is, but rather, whether San Francisco has a legitimate, sincere secular purpose in displaying the particular cross. The creche in *Lynch* was indisputably a religious symbol, but the government had a secular purpose for displaying the creche.[17] Thus, the inquiry under *Lemon* and prevailing

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star of david with public funds); *Jewish War Veterans v. United States*, 695 F.Supp. 3 (D.D.C.1988) (65 foot cross on military base); *ACLU of Mississippi v. Mississippi State Gen. Servs. Admin.*, 652 F.Supp. 380 (S.D.Miss.1987) (seasonal display of cross on government building); *ACLU of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir.1986) (same); *Libin v. Town of Greenwich*, 625 F.Supp. 393 (D.Conn. 1985) (same); *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir.1980) (use of public funds to construct cross); *Mendelson v. City of St. Cloud*, 719 F.Supp 1065 (M.D.Fla.1989) (cross displayed on government building).

To the extent that these cases are not decisions of the Ninth Circuit or the U.S. Supreme Court, they are not controlling on this Court. Moreover, these cases are easily distinguishable both factually and legally from the case at bar. Four involve displays on government buildings and thus were violative of the effects prong, *see, e.g., Mississippi State; City of St. Charles; Libin*; and *Mendelson*. The *Jewish War Veterans* case was also invalidated under the effects prong. Two involve the use and expenditure of public funds, *see, e.g., Eckels*; and *Gilfillan*. Two employ a "more secular alternative" analysis which has never been recognized by a majority of the Supreme Court, *see, e.g., Rabun County*; and *Eckels*.

[17] In *Lynch*, "[t]he District Court inferred from the religious nature of the creche that the city had no secular purpose for the

Supreme Court precedent is not whether "it" is a religious symbol, but rather, whether there is a secular purpose for "its" display.

The record before this court, as described in the foregoing discussion, indicates that S.F. continues to display the Mount Davidson Cross as a work of art, a cultural landmark, and as part of the history of San Francisco. On these facts, S.F. has "at least a legitimate, sincere secular purpose" for displaying the Mount Davidson Cross. *Cammack*, 932 F.2d at 776 (emphasis in the original).

Accordingly, San Francisco's ownership and display of the Mount Davidson Cross does not violate the first prong – the secular purpose prong – of the *Lemon* test.

(b). *Secular Effect*

The second prong of the *Lemon* test requires that the government practice neither advance nor inhibit religion in its principal or primary effect. *Lemon*, 403 U.S. at 612, 91 S.Ct. at 2111. The inquiry under this prong is "whether the challenged governmental practice has either the purpose or effect of 'endorsing' religion." *Allegheny*, 492 U.S.

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display . . . " but the Supreme Court rejected this approach, instead, analyzing the purpose behind the city's "inclusion of the creche in the display . . . " and finding that the display of the creche "depicts the historical origins of this traditional event." *Lynch*, 465 U.S. at 680, 104 S.Ct. at 1362. See also *Allegheny*, 492 U.S. at 632-37, 655, 109 S.Ct. at 3122-24, 3134 (where five Justices recognized the menorah as a religious symbol, but found it to survive constitutional scrutiny under the Establishment Clause).

at 591, 109 S.Ct. at 3100.[18] Whether the challenged governmental practice unconstitutionally endorses religion, in turn, necessarily depends on its particular physical setting. *See Allegheny*, 492 U.S. at 593, 109 S.Ct. at 3101 ("the effect of a creche display turns on its setting").[19] Based on the evidentiary record in the case at bar, this Court concludes that S.F.'s current ownership and display of the Mount Davidson Cross, judged within its context of secular original and contemporary history, its landmark qualities, and its secluded geographic location, does not have the principal or primary effect of advancing or endorsing religion.

In *Allegheny*, the Supreme Court was faced with two separate challenges to: (1) a creche displayed inside the County Courthouse; and (2) a menorah displayed next to a christmas tree in front of the City-County Building. The Court found that the display of the creche violated the effects prong of *Lemon*, but that the display of the menorah did not.[20] The critical distinction between the two

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[18] The Court in *Allegheny* recognized that "the word 'endorsement' is not self-defining. . . . but rather, the inquiry prohibits 'favoritism,' 'preference,' or 'promotion.' " *Allegheny*, 492 U.S. at 591-93, 109 S.Ct. at 3100-3101.

[19] *See also, Allegheny*, 492 U.S. at 596, 109 S.Ct. at 3103 ("That inquiry, of necessity, turns upon the context in which the contested object appears . . . Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion.") (Blackmun, J. joined by Stevens, J. concurring); *Id.* 492 U.S. at 625, 109 S.Ct. at 3118 (same) (O'Connor, J. concurring).

[20] The only issue addressed by the Supreme Court in *Allegheny* was whether the two displays violated the effects prong. The purpose and entanglement elements of the *Lemon*

displays centered on an examination of the entire context of the displays.

The context in which the *Allegheny* creche was displayed is easily distinguishable from S.F.'s display of the Mount Davidson Cross. The creche in *Allegheny* was not only located in the County Courthouse, but it also sat on the Grand Staircase, "the 'main' and 'most beautiful part' [and 'most public' part] of the building that is the seat of county government." *Allegheny*, 492 U.S. at 598, 109 S.Ct. at 3104. Moreover, "the county's own press releases made clear to the public that the county associated itself with the creche." *Id.*, 492 U.S. at 600, n. 50, 109 S.Ct. at 3104, n. 50. On these facts, "[n]o reasonable viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.*, 492 U.S. at 598, 109 S.Ct. at 3104. Thus, the Allegheny Court held, "by permitting the 'display of the creche in this particular physical setting,' the county sends an unmistakable message that it supports and promotes the . . . creche's religious message." *Id.*

On the other hand, as discussed earlier in this opinion, the Mount Davidson Cross is not located on, in front of, adjacent to, or even near city hall or any city owned building. To the contrary, the Mount Davidson Cross is located in a relatively remote place, surrounded by a wooded and natural wilderness environment making it only partially visible on a clear day, and can not be seen at night. It is certainly not located in the "main" and

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inquiry were not addressed by the Court. *See Allegheny*, 492 U.S. at 594, n. 45, 109 S.Ct. 3101, n. 45.

"most beautiful" and "most public" part of the city. Moreover, there are no "press releases" or signs identifying the Mount Davidson Cross as belonging to the city or associating the city with the cross.

Furthermore, as discussed earlier in this opinion, the Mount Davidson Cross has become an integral part of the historical and cultural landscape of San Francisco. The quality and significance of the Mount Davidson Cross' historical and cultural heritage is relevant in determining whether it has the effect of endorsing religion.

> Under the endorsement test, the "history and ubiquity" of a practice is relevant not because it creates an "artificial exception" from that test. On the contrary, the "history and ubiquity" of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.

Allegheny, 492 U.S. at 630, 109 S.Ct. at 3121 (O'Connor, J. concurring); *See also, Id.*, 492 U.S. at 602-611, 109 S.Ct. at 3106-3110 (majority opinion). In viewing its unique historical and cultural background, and its physical setting, a viewer could reasonably think that the Mount Davidson Cross occupies its remote location without the support and approval of government endorsement of religion.

Thus, based on the evidentiary record before this Court, this Court concludes that by permitting the display of the Mount Davidson Cross in its particular physical setting, and given its unique historical and cultural background, S.F. does not send an unmistakable message

that it supports and promotes the cross's religious message. Therefore, San Francisco's ownership and display of the Mount Davidson Cross does not violate the second prong – the secular effect prong – of the *Lemon* test.

(c). *Excessive Entanglement*

The third prong of the *Lemon* test prohibits excessive government entanglement with religion. *Lemon*, 403 U.S. at 613, 91 S.Ct. at 2111. The Ninth Circuit instructs that "[t]he entanglement prong seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs." *Cammack*, 932 F.2d at 780. The Supreme Court has further recognized that "[e]ntanglement is a question of kind and degree." *Lynch*, 465 U.S. at 684, 104 S.Ct. at 1365.

In this case, as in *Lynch*, there is no evidence of contact with church authorities concerning the content or design of the cross prior to its construction. Even if there were such contact, it would have occurred fifty-seven years ago, and there is no evidence of such contact presently. Additionally, as in *Lynch*, no expenditures for maintenance of the cross are necessary; at best the tangible amount benefitting the cross through expenditures for maintenance of the park is *de minimis*. Thus, as in *Lynch*, the evidence conclusively demonstrates that, "[t]here is nothing here . . . like the 'comprehensive, discriminating, and continuing state surveillance' or the 'enduring entanglement' present in *Lemon*." *Lynch*, 465 U.S. at 684, 104 S.Ct. at 1365, *quoting Lemon*, 403 U.S. at 619-622, 91 S.Ct. at 2114-2116.

Evidence of entanglement may also be demonstrated if the challenged government action causes religion-based political divisiveness. *See Cammack*, 932 F.2d at 781. "[A] litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement." *Lynch*, 465 U.S. at 684-685, 104 S.Ct. at 1365-66. Moreover, the Supreme Court "has not held that politically divisiveness alone can serve to invalidate otherwise permissible conduct." *Id.* at 684, 104 S.Ct. at 1365. Since "[t]his case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, no inquiry into potential political divisiveness is even called for." *Lynch*, 465 S.Ct. at 684, 104 S.Ct. at 1365, *citing Mueller v. Allen*, 463 U.S. 388, 403-404, n. 11, 103 S.Ct. 3062, 3071-3072, n. 11, 77 L.Ed.2d 721 (1983). In any event, there is no evidence of either S.F. being excessively entangled in religious affairs as a result of its ownership of the Mount Davidson Cross or that the cross passively standing in a municipal park creates political divisiveness along religious lines.

Therefore, San Francisco's ownership and display of the Mount Davidson Cross does not result in excessive government entanglement in violation of the third prong of the *Lemon* test.

4. Conclusion

In summary, given the unique original and contemporary history, landmark quality, geographic location, and physical surroundings of the Mount Davidson Cross, the evidentiary record before this Court does not support the conclusion that S.F.'s ownership and maintenance of

the Mount Davidson Cross violates the Establishment Clause of the First Amendment to the United States Constitution under the *Lemon* analysis.[21]

V. CONCLUSION

The Mount Davidson Cross is not situated within, on top of, adjacent to, or near City Hall or any other governmental buildings, nor can it be viewed with governmental buildings as the primary backdrop. Instead, it

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[21] In *Allegheny*, Justice Kennedy, joined by three other Justices, filed a separate opinion that departed from the traditional *Lemon* analysis. He criticized the Court's holding that the County of Allegheny's display of a creche in the County Courthouse violated the Establishment Clause. He concluded that the court's treatment of the creche issue "reflects an unjustified hostility towards religion, a hostility inconsistent with our history and our precedents." 492 U.S. at 655, 109 S.Ct. at 3134. The four Justices then advanced two principles in evaluating Establishment Clause cases:

> [g]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that in fact "establishes a [state] religion or religious faith, or tends to do so."

Id. 492 U.S. at 658-59, at 3136, *quoting Lynch*, 465 U.S. at 678, 104 S.Ct. at 1361.

Judged by Justice Kennedy's Establishment Clause test, the constitutionality of the Mount Davidson Cross would likewise be upheld. San Francisco does not coerce anyone to support or participate in any religion or its exercise at, near, or involving the Mount Davidson Cross. San Francisco's minimal maintenance of the Mount Davidson area does not constitute direct benefits to religion to such a degree that in fact establishes a state religion or religious faith, or tends to do so.

stands silently, often obstructed by darkness, fog, and trees, in the same location where it has stood for 57 years as part of the rich history and culture of San Francisco. The park is not even identified as belonging to the city. It appears ironic that San Francisco, which not only tolerates but appears to embrace literally almost any activity, conduct or philosophy, regardless of how strange or unusual, would somehow be deemed to be making law establishing or preferring any particular religion. Therefore, the display of the Mount Davidson Cross, in this context, need not be permanently enjoined.

Accordingly, for all of the foregoing reasons, defendants' motion for summary judgment is hereby GRANTED and plaintiffs' motion for summary judgment is hereby DENIED.

IT IS SO ORDERED.

App. 50

Case No. 92-16767

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR CARPENTER, ET AL.
Plaintiffs/Appellants

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.
Defendants/Appellees

Appeal from the United States District Court
For the Northern District Of California

APPELLEES' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION AND STATEMENT OF COUNSEL

Defendants/appellees (collectively, the "City") seek rehearing of the issue decided by the panel: Does the City's preservation of the Mt. Davidson cross, a structure in a remote park, partially obscured by trees, bearing no indicia of government ownership, violate the "No Preference Clause" of the California Constitution? On cross motions for summary judgment the district court found in favor of the City on that point, in light of the unique physical setting and historical and cultural context of the Mt. Davidson cross. The panel reversed, holding that the presence of the structure on public land violated the No Preference Clause, and remanded the case to the district court to fashion relief. (Slip Op. at 10516.)

In the judgment of counsel for the City, rehearing is appropriate pursuant to Federal Rule of Appellate Procedure 40, as the panel's decision overlooks material state court decisions interpreting the California Constitution

and violates the standard for summary judgment under Federal Rule of Civil Procedure 56. Rehearing is particularly appropriate where, as here, the panel was charged with predicting how the California Supreme Court would apply a seldom-construed clause of the state Constitution.

Rather than basing its interpretation of California law on state court decisions, as it is bound to do, *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991), the panel implicitly applied a *per se* rule – no government-owned cross may ever remain on *any* government property – that is nowhere to be found in California constitutional jurisprudence. Whether a federal court properly interpreted the California Constitution in applying such a rule is a question of exceptional importance, warranting rehearing *en banc*. *See* Federal Rule of Appellate Procedure 35.

The panel's decision also violates the standard for summary judgment under Rule 56. By remanding only the question of relief to the district court, the panel effectively granted plaintiffs' motion for summary judgment. The City presented evidence contradicting plaintiffs' position regarding the material facts of visibility and historical significance. Under these circumstances, granting summary judgment to plaintiffs violates Rule 56. *LaSalvia v. United Dairymen of Arizona*, 804 F.2d 1113, 1116-18 (9th Cir. 1986), *cert. denied*, 482 U.S. 928 (1987).

This appeal should be reheard. If the panel denies rehearing, the city respectfully suggests that it be reheard *en banc*.

ARGUMENT

I. THE PANEL'S *PER SE* RULE OF CALIFORNIA CONSTITUTIONAL LAW IS NOT SUPPORTED BY CALIFORNIA COURT DECISIONS

The panel held that the Mt. Davidson cross violates the No Preference Clause of the California Constitution. (Slip Op. at 10516.) Although the opinion acknowledged that "California courts remain the wellsprings for state constitutional jurisprudence" (*Id.* at 10509), the panel did not apply the teachings of the relevant California cases in reaching its decision. Instead, the panel applied the five factors used in *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), *cert. denied, San Diego County v. Murphy*, 114 S. Ct. 2707 (1994), *cert. denied, City of San Diego v. Paulson* 115 S. Ct. 311 (1994), which it recognized does *not* form a "definitive test" used by California courts. (Slip Op. at 10510.) Even if the *Ellis* "test" accurately reflects California law, the panel's application of those factors in this case does not.[1] In effect, the panel transformed the *Ellis* factors into a *per se* rule against government-owned crosses on government property. That rule overlooks state court decisions interpreting the No Preference Clause and ignores *Ellis* itself.

The California Supreme Court has recognized that " 'The Government may depict objects with spiritual content, but it may not promote or give its stamp of approval to such spiritual content.' " *Fox v. City of Los Angeles*, 22

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[1] *See Ellis*, 990 F.2d at 1526 n.5 (noting that the district court's holding in this case "highlights the fact-based contextual inquiry required by these kinds of cases").

Cal. 3d 792, 798 (1978), *quoting Allen v. Hickel*, 424 F.2d 944, 948 (D.C. Cir. 1970). Accordingly, this Court has also acknowledged that under the California Constitution:

> The mere fact that the display stands on public property is *not enough* to call into play the particular locational concerns of *Fox* and *Okrand*. In those cases it was the conjunction of religious symbolism with the institutions of government that enhanced the appearance of government endorsement of religion.

Ellis, 990 F.2d at 1526 (emphasis added).

Despite that clear statement by this Court, the panel held the Mt. Davidson cross unconstitutional *in the absence of* any conjunction between religious symbolism and the institutions of government. In effect, the panel's decision implies that a government-owned cross on government property always violates the California Constitution, no matter how far removed from the institutions of government or, considering the historic and cultural context, how attenuated the appearance of government endorsement. This *per se* rule conflicts with the way the California courts have interpreted the California Constitution.

The California cases make clear that government ownership of a structure with religious connotations does not equal government preference for religion. In *Fox*, the California Supreme Court found unconstitutional crosses illuminated on all four sides of city hall. There, the government endorsement implied by the conjunction of the religious symbolism – the cross – with the institutions of government – city hall – was exacerbated by other factors, including the apparent religious motivation of the

display and its visibility for many miles in many directions. *Fox*, 22 Cal. 3d at 794-98. The court did not hold that no cross could ever be displayed by the government, but instead mildly noted only that illumination of the cross on city hall did "seem preferential when comparable recognition of other religious symbols is impracticable." *Id.* at 797.

Although the conjunction of religious symbolism with government was equally obvious in *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566 (1989), where a menorah was displayed in the very heart of city government – the rotunda of city hall – during the Jewish holiday of Chanukah, the court did not find an unconstitutional exhibition of preference. *Okrand*, 207 Cal. App. 3d at 578. In that case, the appearance of endorsement was mitigated by other factors, such as the placement of the unlit menorah in a corner of the rotunda near a Christmas tree. *Id.* at 579.

The structure at issue in this appeal has no apparent conjunction with the institutions of government. It is undisputed that the park in which the structure stands is remote from any government buildings. It also is undisputed that there are no signs identifying the park or the cross as belonging to the City. The City does not promote, advertise or illuminate the cross. (ER 35, 39.) Under these circumstances, very little mitigation of any appearance of endorsement should be necessary. Nevertheless, the mere fact that the cross stands on public land led the panel to consider the same factors that the California decisions applied only where there was a conjunction between religious symbolism and the institutions of government. *See Ellis*, 990 F.2d at 1526.

The result of that unwarranted analysis was the implicit creation and application of a federal *per se* rule that a government-owned cross on government property will never be found constitutional under the No Preference Clause of the California Constitution. Although that may be the result plaintiffs were seeking, it is not justified by California law, and should not be allowed to stand.

When interpreting state constitutional law, a federal court must follow state court opinions. *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991). Here, the panel extended the factors listed in *Ellis* and created its own *per se* rule. The question whether a panel may do so is an issue of exceptional importance, and merits rehearing *en banc*.

II. THE PANEL IMPROPERLY RESOLVED MATERIAL FACTUAL DISPUTES

Even if application of the *Ellis* factors in this appeal were correct, the decision should not stand, because it improperly resolves material factual disputes in plaintiffs' favor.

The panel's opinion rejects the district court's conclusion that the Mt. Davidson cross is not visible or identifiable as a cross from most San Francisco locations. (Slip Op. at 10512.) In doing so, the panel overlooks the Declaration of James Cooney, Assistant Superintendent for Urban Forestry and Turf Management. (SER 61-69.) This evidence established that at the time of the hearing before the panel, the tallest tree on Mt. Davidson would have been taller than the cross, blocking the view from locations on that side of the cross. The panel fails to mention

this evidence that the height and placement of the trees surrounding the cross make it unidentifiable as a cross from many vantage points.

The opinion also fails to mention the study conducted by Corey, Canapary & Galaris. (SER 70-331.) That study indicated that nearly 40% of San Francisco adults were not aware of the structure on top of Mt. Davidson, and nearly 75% of San Francisco adults were not aware that the City owns Mt. Davidson park. (SER 79.)

These material facts buttress the visual evidence contained in the City's videotaped visibility study, which shows that Mt. Davidson is one of many hills in a landscape of hills, and the cross on Mt. Davidson is obscured by tall trees and dwarfed by the nearby Sutro Tower. (SER Vol. III.) From many locations the cross cannot be seen at all, and from others it is not recognizable as a cross. (*Id.*)

Rather than viewing all the evidence in the light most favorable to the City, as it was required to before directing relief for plaintiffs, *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996), the panel discounted the objective visibility study, while giving undue weight to an introductory statement in the City's report on the *history* of the cross, comments about the familiarity (not visibility) of the structure, and statements concerning its visibility in 1954 (ER 161), 1980 (ER 105-110), 1982 (ER 134), or 1989 (ER 320), when it was still illuminated. *See Okrand*, 207 Cal. App. 3d at 579 (considering the *present* visibility of the menorah, not the visibility in the first years of its display, when it was lighted). Viewed in the light most favorable to the City, the evidence does not show that the structure on Mt. Davidson is as widely

visible as the cross in *Fox* or the solitary crosses on solitary mountains in *Ellis*.[2]

Even if the panel correctly concluded that summary judgment in favor of the City was not supported by the record, the remedy is a remand for trial, not the resolution of factual issues in favor of the plaintiffs.

CONCLUSION

For the reasons stated above, the City requests that the panel withdraw its opinion and rehear the appeal. If the panel denies rehearing, the City respectfully suggests rehearing *en banc*.

Dated: September 3, 1996

Respectfully submitted,

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CITY AND COUNTY OF
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[2] The panel also replaced the district court's conclusion regarding the historical and cultural significance of the structure, *Carpenter v. City and County of San Francisco*, 803 F. Supp. 337, 343 (N.D. Cal. 1992), with plaintiffs' view of these factors. For example, the panel failed to view in the light most favorable to the City such historical evidence as the dedication ceremony in which President Franklin D. Roosevelt participated, even though it concluded that the event has "arguably" non-religious historical significance. (Slip Op. at 10514.)

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City and County of
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTOR CARPENTER; ALLEN BENNETT; JAMES LOWDER; RICHARD SPEAR; ALBERT C. WALKER; RONALD Y. NAKASONE; MOLLEEN MUTSUMARA; and MICHAEL BAUMAN, Plaintiffs-Appellants, v. CITY & COUNTY OF SAN FRANCISCO, THE SAN FRANCISCO COUNTY RECREATION AND PARK COMMISSION; and MARY BURNS, in her official capacity as General Manager of San Francisco County Recreation and Park Department, Defendants-Appellees.	No. 92-16767 D.C. No. CV-90-01836-JPV ORDER (Filed Oct. 16, 1996)

Before: LAY*, PREGERSON, and O'SCANNLAIN, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.